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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK and THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF RESPONDENT CITIZENS ACTION COALITION OF INDIANA, INC.

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INTRODUCTORY STATEMENT

Citizens Action Coalition of Indiana, Inc. (Citizens Action), a not-for-profit membership organization, represents the interests of residential consumers in utility-related matters. Citizens Action petitioned for review of Orders 888 and 888A, supported the position of the petitioners State of New York, *et al.* (State Commissions) in the Court of Appeals, and separately argued that the respondent Federal Energy Regulatory Commission (FERC) exceeded its statutory jurisdiction by asserting regulatory authority over unbundled retail transmission.[1] Accordingly, under Sup. Ct. R. 12.6, Citizens Action is a respondent in this Court, and is a respondent that is permitted to file briefs supporting the petitioner State Commissions. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 324-25 (7th ed. 1993); *see, e.g.*, *Director v. Perini*, 459 U.S. 297, 304 (1983).

Citizens Action did not file an opening brief on the merits. Citizens Action submits this reply brief to answer the Respondents' repeated suggestions that technological and other changes allegedly unforseen by Congress justify FERC's action asserting jurisdiction over retail transmission under the Federal Power Act.

Taken as a whole, the several briefs opposing the State Commissions create the impression that the 1935 Congress foresaw only dimly, if at all, the key components of today's electric industry. FERC itself (Br. 5, 16-17) conveys the

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1. *See* Initial Brief of Petitioners Opposing Stranded Cost Recovery at 52-53 (D.C. Cir. No. 97-1715); Reply Brief of Petitioners Opposing Stranded Cost Recovery at 24-26, 27-28 (D.C. Cir. No. 97-1715).

idea with statements that "[t]he interconnected nature of transmission grids, and their use in interstate commerce, have increased dramatically since 1935"; that electric utilities "[a]t that time" were "largely self-sufficient . . . with their own . . . facilities," and "sold their generation, transmission, and distribution services as a single bundled service to wholesale and retail customers"; and that the federal agency is now confronted with the problem of "applying the [Federal Power Act] to a new paradigm . . . not specifically contemplated by Congress in 1935 . . . ." This conception, that the interstate transmission grid has evolved into a new and qualitatively different reality, is the premise for arguments that regulatory policy should also evolve in ways that Congress did not intend.[2] This conception is wrong.

Considered individually, some of the characterizations of the 1935 grid are more or less accurate. The overall impression conveyed, however, is not. The key components of the electric industry, and their direction of change, were known in 1935 and were before the Congress when it made the decision to preserve State jurisdiction to the full extent it then existed. There have not been subsequent technological or other changes that make the 1935 Congress' choices about federalism impossible to implement, or even difficult to evaluate as applied to contemporary circumstances. There have not been subsequent legislative changes that call the 1935 Congress' choices into question. To the contrary, the Congress in 1992 affirmed the legislative decisions of 1935 on the basic division between State and Federal regulatory jurisdiction. Nor has there been any FERC regulatory practice inconsistent with Congress' decision to preserve state

2. *See, e.g.*, FERC Br. 16-17, 20-21, 39-40; Enron Resp. Br. 9-10, 25 n.13, 36-37, 39-40; TAPS Br. 4-10, 41-45; Pennsylvania PUC *amicus* Br. 3-4.

authority over all aspects of retail electric service, until the order on review in this case. It is not for FERC now to countermand the considered judgments of Congress.

ARGUMENT

I. Congress Knew The Key Points Concerning Transmission Network Design, Evolving Transmission Technology And Infrastructure, And The Increasingly Interstate Nature Of The Industry When It Chose To Preserve State Jurisdiction In 1935.

A. The Context of the 1935 Act.

The basic framework and most of the statutory sections that constitute today's Federal Power Act were enacted in 1935. The enacting legislation, however, contained more than that and had three parts:

(1) The Public Utility Holding Company Act of 1935.

(2) Amendments to the Federal Water Power Act of 1920 (which dealt with hydroelectric facilities, and which became what is known as Part I of the Federal Power Act).

(3) The provisions known as Parts II and III of the Federal Power Act, Part II of which establishes the scope of the FERC jurisdiction at issue in this case.

See S. Rep. No. 621, 74th Cong., 1st Sess., at 1, 4, 17 (1935) ("1935 Senate Report"); *see generally*, H.R. Conf. Rep. No. 1903, 74th Cong., 1st Sess. (1935).

The combination of the Public Utility Holding Company Act and the Federal Power Act in a single piece of legislation was not fortuitous. The basic design and much of the infrastructure of the Nation's electric industry had been developed by several large holding companies. *See* H.R. Rep. No. 1318, 74th Cong., 1st Sess. at 3 (1935) ("1935 House Report"); *Public Util. Holding Co. Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess., at 797 (1935) ("*Senate Hearings*"). These holding companies created extensive multi-state electric systems by acquiring, combining and jointly operating many local electric utilities. Because of their interstate nature, the holding companies had grown beyond effective regulatory control of the States and had engaged in a variety of abuses. *Senate Hearings* at 3, 5, 798; *Public Util. Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess., Pt. 1 at 90, 407-09 (1935) ("*House Hearings*"). At the same time, however, the large and interstate electric systems they created were (at least in many instances) technologically and economically efficient and superior to isolated local electric utilities. *See, e.g.*, *House Hearings* at 534-35.

FERC's predecessor the Federal Power Commission (FPC) itself prepared the Federal Power Act parts of both H.R. 5423 and S. 1725 as introduced, and these FPC-sponsored parts were presented to the congressional committees by FPC Commissioner Seavy and FPC Solicitor DeVane. *House Hearings* at 383-84, 400-01, 449-50; *Senate Hearings* at 223. The Public Utility Holding Company Act part of the legislation would abolish or diminish the multi-state holding companies. As proposed by the FPC, Federal Power Act Part II was designed, *inter alia*,

to preserve (and further promote) large interstate electric "systems" while replacing holding company control with federal agency control. *See, e.g.*, *Senate Hearings* at 238-39 (FPC Solicitor DeVane); *House Hearings* at 517, 563-64 (same).

In the end, Congress was unwilling to grant the FPC powers anywhere near as expansive as requested in its proposed legislation. Instead, Congress reserved to the States all of the authority they then enjoyed. Because of the scope of the FPC's proposal, however, extensive hearings were held which made the Congress fully aware of the increasingly interstate nature of the industry and of the technological and economic factors that underlay these developments. Two aspects of the FPC's proposal, discussed below, are particularly significant in demonstrating the important features of the electric industry in 1935, and what Congress understood and foresaw at that time.

B. Congress' Knowledge of Transmission Technology, Interconnected Grids, Interstate Transmission Networks, and the Changing Nature of Their Use.

1. Facilities

The FPC's proposed legislation would have given the federal agency regulatory authority over the certification, construction and abandonment of transmission and generation facilities, and also authority to order interconnection between existing facilities. These FPC proposals appeared as Sections 203 and 204 in the original Senate and House bills, *Senate Hearings* at 40; *House Hearings* at 32, and were also described in the FPC's section-

by-section analysis submitted to the congressional committees, *Senate Hearings* at 246 (§§ 203-204); *House Hearings* at 385 (same). If granted, these powers would have given the FPC control over the basic physical design and development of the Nation's electricity system. *See, e.g.*, *House Hearings* at 392-93 (FPC Commissioner Seavy); *id.* at 501 (FPC Solicitor DeVane); *Senate Hearings* at 249-50, 279 (same).

In considering these proposed FPC powers, the congressional committees heard extensive evidence concerning the interstate electric system and its expansive growth. Maps depicting the geographical areas covered by the large interstate holding companies were presented. *House Hearings* at 264-65 (Lester Ready).[3] As one example, the "pink area" of one map showed "the area of the properties . . . affiliated with the Electric Bond & Share Co., and the United Corporation properties. . . . The major areas covered are the southeastern section, the New York area, Pennsylvania, Ohio, West Virginia, Michigan and such areas." *Id.* at 265. Other maps were presented depicting (1) the geographic coverage of "all transmission lines of 60,000 volts and over and . . . all power plants of 15,000 kilowatts and over" throughout the United States, and (2) lower voltage transmission lines over particular multi-state areas. *Id.* at 269-70. The expert testimony explained how with few exceptions the transmission networks did not correspond with state boundaries and encompassed multi-state territorial areas. *Id.*; *see also, e.g.*, *Senate Hearings* at 243-44 (FPC Solicitor DeVane).

3. Mr. Ready was identified as the Chief Consultant for the National Power Survey, a year-long federal study commissioned by Executive Order No. 6251. *House Hearings* at 263; *see also Senate Hearings* at 240, 798.

Congress also heard about the rapid expansion of interstate transmission facilities, and the concomitant increases in the proportion of the Nation's electricity transmitted across state boundaries. *House Hearings* at 266 (Mr. Ready); *id.* at 420 (FPC Commissioner Seavy); *see also* 1935 Senate Report at 17. By 1933, over 17% of all electricity was being transmitted across state lines, and that proportion had increased by more than 50% in just four years. *House Hearings* at 266 (Mr. Ready): *see also id.* at 420 (Commissioner Seavy); 1935 Senate Report at 17; 1935 House Report at 7. In many areas, the proportion transmitted across state lines by 1933 was substantially larger. For example, Pennsylvania exported over 40% of its electric generation while importing 20% as much as was generated within the Commonwealth. *House Hearings* at 267 (Mr. Ready). "New Hampshire and Vermont exported 61.1 and 70.8 percent, respectively, of the power . . . produced in those states," whereas Delaware imported virtually all of its power. *Id.* at 268-69. This information was presented for all 48 States and by selected multi-state regions. *Id.* at 267-68; *see also Senate Hearings* at 241-43 (FPC Solicitor DeVane).

Congress also heard about the continuing advances in transmission technology, including increased voltages (by that time, up to 285 kv.). *House Hearings* at 271 (Mr. Ready). Congress was informed that "[t]he longest single transmission line for large transmission of power [was] about 270 to 300 miles in length," and that for smaller exchanges of power there were systems interconnected "for as many as six and seven hundred miles." *Id.* at 270. The limits on transmission distance were described as a function of variable economic factors, including cost of fuel, cost of money, amount of power, and location of the market. *Id.* at 270-72.

Congress also heard about the concept and functioning of a transmission grid established by interconnection, and the term "grid" was even used. *Senate Hearings* at 277-78 (memorandum submitted by FPC Solicitor DeVane). Congress was told that "[t]he largest saving arising from a grid is the reduction of excess generating capacity in the interconnected area." *Id.* at 278. It was given an illustration involving "an area extending from Keokuk and St. Louis to Detroit, including Chicago and Milwaukee . . . ." *Id. See also, e.g.*, *House Hearings* at 271 (Mr. Ready); *Senate Hearings* at 274 (Solicitor DeVane).

2. Transmission

Another key part of the FPC's proposed legislation was Section 202, which provided, *inter alia*, that:

> (a) It shall be the duty of every public utility to . . . transmit energy for any person upon reasonable request therefor . . . .

Senate Hearings at 40; *House Hearings* at 32. This would have made utility transmission systems "common carriers" available for use by others. *House Hearings* at 395-96 (FPC Commissioner Seavy). Concomitantly, the FPC would be empowered to order utilities to "transmit energy for . . . one or more other persons." *Id.* at 32 (§ 203(b)); *Senate Hearings* at 40 (same). To support this FPC proposal, Congress was told about the many transmission service arrangements already existing by 1935. *House Hearings* at 533-35, 537 (FPC Solicitor DeVane); *Senate Hearings* at 271-72 (Statement submitted by Solicitor DeVane).

C. Congress' Informed Decision to Preserve State Jurisdiction.

The 1935 Congress declined to enact these parts of the FPC's proposed legislation. The Senate eliminated the provisions that would have given the FPC authority over the certification, construction and abandonment of transmission and generation facilities. 1935 Senate Report at 20.[4] The Senate also eliminated the FPC's proposed "common carrier" provisions that would have required utilities to transmit electricity for other persons. *Id.* at 19; *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973); *id.* at 384-86 (Stewart, J., concurring in part and dissenting in part).

Congress did give the FPC authority to order interconnection, although only upon the request of a utility or state commission (and subject to other limitations). 1935 Senate Report at 19; 1935 House Report at 8, 27-28; *see* 16 U.S.C. § 824a(b). The Congress did so knowing that the increased interconnection would further increase the

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4. The House subsequently eliminated all general FPC jurisdiction over generation facilities. 1935 House Report at 27; *see* 16 U.S.C. § 824(b)(1). The Federal Power Act is quite different from the Natural Gas Act in this respect. Under the Natural Gas Act, the FPC (now FERC) is given regulatory authority over the certification, construction and abandonment of gas transmission facilities (including a federal eminent domain power), 15 U.S.C. § 717f, and the interstate gas facilities subject to this FERC jurisdiction may be used for retail delivery, *see, e.g.*, *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana*, 332 U.S. 507, 509-10, 523 n.23 (1947). Congress has never given FERC any comparable regulatory authority over electric facilities, including transmission facilities, despite repeated proposals that it do so. *See, e.g.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 386 & n.4 (1973) (Stewart, J., concurring in part and dissenting in part).

proportion of electricity transmitted across state lines. *See, e.g., Senate Hearings* at 241 (FPC Solicitor DeVane) ("Proper interconnection between these systems would tend to greatly increase the percentage [of power transferred across State lines]").

The 1935 Congress deleted and modified these provisions in the FPC's proposed bill at the request of state commissions. *See, e.g., Senate Hearings* at 749-50, 1083-84 (John Benton).[5] Congress decided instead to preserve and protect the regulatory jurisdiction of the States. 1935 Senate Report at 18; 1935 House Report at 8. The federal agency's jurisdiction was generally limited to areas where Congress believed the States could not legally or effectively regulate.[6]

When it made these fundamental political choices in 1935, Congress understood the key components of the electric industry, including interstate transmission systems, interconnected grids, continuing advances in transmission technology, the increasing proportions of power being transmitted across State boundaries, and the use of "common carrier" transmission service. These are still the key components of the industry today. As Justice Jackson noted

5. Mr. Benton was General Solicitor for the National Association of Railroad and Utilities Commissioners. *Senate Hearings* at 746.

6. The areas prominently mentioned were regulation of wholesale rates in interstate commerce; determination of costs of interstate facilities used for retail service (for purposes of ratemaking by State commissions); regulation of interstate consolidations and interconnections; and establishment of regional districts. 1935 Senate Report at 48, 51; 1935 House Report at 7-8.

for the Court, Congress made its fundamental choices in 1935 based not solely upon "engineering and scientific" facts concerning the interstate grid, but rather in significant part upon considerations of federalism and "the existence and vitality of these state governments." *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 529-30 (1945).

II. Congress Affirmed Its 1935 Choice To Preserve State Jurisdiction In The 1992 Amendments.

In the 1992 Energy Policy Act amendments to the Federal Power Act, Congress revisited and affirmed the basic political choices made in 1935 on the division between State and Federal regulatory jurisdiction.

On one hand, the 1992 Congress granted FERC authority to order wheeling (unbundled transmission service) on a case-by-case basis. *See* 16 U.S.C. § 824j. In doing so, Congress expressly limited that federal wheeling authority to "*wholesale* transmission services . . . ." 16 U.S.C. § 824k(a) (emphasis added).[7]

On the other hand, the Congress added that FERC has no authority — under any part of the Federal Power Act — to interfere "with any State law which governs the retail marketing areas of electric utilities." 16 U.S.C. § 824k(g).

7. Contrary to Enron's statement (Resp. Br. 37), Congress did not authorize FERC generically to order wheeling "for other users." Rather, it expressly limited FERC's wheeling authorization to wholesale transmission. 16 U.S.C. § 824k(a). Congress also limited the class of persons who could request a wholesale wheeling order to those "generating electric energy for sale for resale." 16 U.S.C. § 824j(a). Contrary to statements made to the Court, Congress did not include "other suppliers and marketers," Enron Resp. Br. 11, or "any person," Pennsylvania PUC *amicus* Br. 6.

Congress further provided that FERC has no authority — again under any part of the Federal Power Act — to order retail wheeling. 16 U.S.C. § 824k(h).

By these provisions, the 1992 Congress affirmed the Federal Power Act's most basic division of jurisdictional authority — that between retail service (which is State-jurisdictional) and wholesale service (which is Federal-jurisdictional). In affirming this jurisdictional division, the 1992 Congress understood that States themselves might provide for retail wheeling (*i.e.*, unbundled retail transmission service, which permits competition for retail power sales):

> New section 212(h) of the Federal Power Act contains a savings clause for State laws dealing with retail wheeling. Thus, State laws that either prohibit or permit retail wheeling are unaffect[ed] by this subsection.

H.R. Conf. Rep. No. 102-1018, at 388 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2472, 2479. Knowing this, Congress nevertheless precluded FERC from issuing retail wheeling orders *even if States permit retail wheeling*. 16 U.S.C. § 824k(h).

Thus, although some parties have argued to the Court that State jurisdiction over unbundled retail transmission is unacceptable from a national perspective, the 1992 Congress decided otherwise. Even where a State provided for retail wheeling, Congress limited its grant of wheeling authority to FERC to "wholesale transmission service." 16 U.S.C. § 824k(a).[8]

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8. Similarly, although some parties have argued to the Court that protection of a utility's native load customers in preference to (Cont'd)

III. The FERC Decisions TAPS Cites Do Not Show That FERC Regulated "Unbundled Retail Transmission" Before Order 888.

The issue before this Court is whether *FERC* erred in asserting jurisdiction under the Federal Power Act over the rates (and other terms and conditions) of unbundled transmission service purchased by retail customers. TAPS (Br. 38-40) confuses the issue by asserting , based on certain FERC cases involving New York and California, that FERC "has regulated unbundled retail transmission for decades." TAPS is wrong because the cases it cites are, on their faces, inapposite to the issue in this case.

The New York cases TAPS cites all involve transmission service purchased not by a retail customer but by another utility. In *Consolidated Edison Co. of New York*, 15 F.E.R.C. ¶ 61,174 (1981), the Power Authority of the State of New York (PASNY) purchased transmission service for its power from Consolidated Edison. PASNY in turn sold a bundled service to the Port Authority, PASNY's retail customer. In asserting jurisdiction over the PASNY-Con Ed contract, FERC specifically stated that Con Ed's transmission

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(Cont'd)
others is illicit, the legislative history of the 1992 Act is filled with statements recognizing the necessity (and propriety) of doing so. *See, e.g., 5 Legislative History of the Energy Policy Act of 1992: Senate Comm. on Energy and Nat. Resources*, S. Prt. 103-91, at 3837 (1994) (Rep. Davis); *id.* at 3879-80 (Rep. Kostmayer); *id.* at 3882 (Rep. Oxley); *id.* at 4166 (Rep. Gillmor); *id.* at 4174 (Rep. Eckart); *id.*, Vol. 6 at 4609 (Rep. McMillen) (House bill modified in conference committee better to protect native load customers); *id.* at 4824 (Sen. Johnston); *id.* at 4836-37 (Sen. Wollop) (a utility "owes its primary duty to its native load").

service was "a service provided and billed to PASNY which, in turn, charges its customers." *Id.* at 61,045.

Likewise, *Power Authority of State of New York v. Niagara Mohawk Power Corp.*, 79 F.E.R.C. ¶ 61,159 (1997), and *Niagara Mohawk Power Corp.*, 34 F.E.R.C. ¶ 61,028 (1986), involved a contract for the New York Power Authority (NYPA) (formerly PASNY) to purchase transmission service from Niagara Mohawk.[9] Similarly, the "FERC Rate Schedule 165" in *Niagara Mohawk Power Corp.*, 82 F.E.R.C. ¶ 63,018 (1998), was a "reciprocal arrangement" for Niagara Mohawk and New York State Electric and Gas Company (NYSEG) to purchase transmission service from each other, with Niagara Mohawk receiving a "net payment" from NYSEG and providing "bundled retail generation sales" to its retail customers. *Id.* at 65,136-37.

The California cases TAPS cites are inapposite for a different reason. They all involve a comprehensive 40-year agreement between the Western Area Power Administration, a federal agency, and Pacific Gas and Electric Company (PG&E) to integrate federal government transmission and generation facilities with PG&E's facilities in California for the purpose, *inter alia*, of delivering federally-generated

9. FERC may have used the decision in 1997 — after Order 888 was issued and while the petitions for review in the instant case were pending — as an occasion to imply that the service sold under the NYPA-Niagara Mohawk contract was "unbundled retail transmission service." *See* 79 F.E.R.C. ¶ 61,159 at 61,745. Attaching labels, however, cannot alter or obscure the substance of the contract — wherein "[Niagara Mohawk] hereby agrees to transmit power for [NYPA]," *id.* at 61,746 (brackets by FERC), and "rates [are charged] to . . . NYPA . . . for the transmission of power . . . ." 34 F.E.R.C. ¶ 61,028 at 61,043.

power to federal end-use facilities. FERC's jurisdiction to decide rate issues purportedly is conferred by the terms of the contract between the United States and PG&E, not by any reference to or application of the Federal Power Act. *See, e.g., Pacific Gas & Elec. Co.*, 15 F.E.R.C. ¶ 63,059, at 65,261 (1981) (Initial Wheeling Rate Decision) (quoting Article 32 of Contract 2948A), *modified*, 20 F.E.R.C. ¶ 61,190, at 61,364-65 (1982) (same).

Finally, jurisdictional issues generally were not addressed by FERC in these cases,[10] much less by a court on review. Even decisions by this Court do not decide jurisdictional issues that were not addressed. *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994). "We have often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998). The same should be true of an unreviewed decision of an administrative agency that did not address the jurisdictional issue in the first place. Thus, these inapposite cases TAPS cites have no precedential value in any event.

10. The only exception was *Consolidated Edison*, where FERC ruled that it had jurisdiction because "[t]he entire transaction [between PASNY and Con Ed] comprises a service provided and billed to PASNY which, in turn, charges its customers." 15 F.E.R.C. ¶ 61,174, at 61,045.

CONCLUSION

Citizens Action supports the petitioner State Commissions' position that FERC's orders should be vacated to the extent they assert federal jurisdiction over unbundled retail transmission, contrary to the Federal Power Act both as enacted in 1935 and as amended in 1992.

Respectfully submitted,

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